

Summary

At present, there is no specific Australian legislation regulating artificial intelligence (AI) technologies. That is in contrast to some other jurisdictions, which have legislation in place, or significantly advanced draft laws, specifically regulating the technology.

The Australian Commonwealth government's interim "safe and responsible AI consultation" response (released January 2024) summarises the government's response to public consultation undertaken¹ on supporting responsible AI technology through an appropriate and targeted regulatory framework (Interim Response)². The Interim Response builds on stakeholder submissions and relays at a high level how the government intends to ensure AI technologies are designed, developed, and deployed safely and responsibly.

In this update, we provide an overview of the government's Interim Response and speculate on how the regulation of AI technologies in Australia may take shape moving forward.

A Look Back

Our publication titled "AI and the Law in Australia and Abroad – A Risk and Regulatory Approach" (December 2023)³ provided commentary on the then current state of governmental policy on AI regulation,⁴ and relayed three key themes gleaned from the government's policy statements.⁵ Those three key themes were:

- The question of whether existing technology-neutral legislation is suitable can only be answered after a comprehensive review of the relevant applicable commonwealth and state laws to appropriately and critically assess if AI-specific legislation is necessary. The suitability of existing technology-neutral legislation can only be determined after a comprehensive review of the relevant applicable commonwealth and state laws to appropriately and critically assess whether AI-specific legislation is necessary.⁶
- Irrespective of the need for AI-specific legislation, it is necessary to consider whether the existing regulatory regimes of broad application are appropriate and adaptable to AI risks.⁷
- The introduction of AI-specific legislation should consider the way in which regulations come into force, including whether a new regulator is required to administer new laws.⁸
- The Interim Response further advanced and refined policy on AI regulation, taking into account the public consultation.



1 That consultation having occurred in June 2023.

2 "[The Australian Government's Interim Response to Safe and Responsible AI Consultation](#)," Commonwealth Department of Industry, Science and Resources (DISR)

3 "[AI and the Law in Australia and Abroad – A Risk and Regulatory Approach](#)," Page 13.

4 That policy being reflected in the DISR discussion paper entitled "[Safe and Responsible AI in Australia](#)" (June 2023) (DISR Discussion Paper).

5 As contained in the DISR Discussion Paper.

6 "[AI and the Law in Australia and Abroad – A Risk and Regulatory Approach](#)," Page 13.

7 *Ibid.*

8 *Ibid.*

The Government's Interim Response

The Interim Response contains the guiding principles that the government considers ought be followed in the process of developing and formalising a regulatory framework for AI in Australia. Those principles and our comments on each principle are displayed below:

Principle	Comment
<p>Principle 1: Risk-based Approach</p> <p>The government will use a risk-focused framework to support the safe development, deployment and use of AI technologies.</p>	<p>The extent of obligations on developers and deployers will vary based on the level of risk posed by the AI system.</p> <p>It appears that the extent of regulations will be determined by the perceived risk level of the AI system, although how such risk levels will be defined and determined is presently unknown.</p> <p>Given the ever-evolving nature of AI technologies and their applications, assessment of risk levels is likely to be challenging. Unfortunately, the Interim Response is not clear how Australia will determine what amounts to "high-risk," such as adopting the EU approach of nonexhaustive high-risk uses (and if so, what that list will include). This will be of critical importance to businesses.</p>
<p>Principle 2: Balanced and Proportionate</p> <p>The imposition of unnecessary or disproportionate burdens for businesses, the community, and regulators, will be avoided.</p>	<p>It is important that the regulations are adequately defined and not too "light of a touch" to ensure the protection of consumers, or too heavy handed on businesses so as to suppress innovation and competition within the AI space. However, it is also noted that this proposed approach is prone to introducing significant complexity and "grey areas" in the law, which of itself causes businesses difficulty. Generally, businesses benefit from a simple regulatory framework that does not involve overly complex rules or distinctions (which then require nuanced application and often legal advice, and which even with advice can at times still be uncertain) .</p>
<p>Principle 3: Collaborative and Transparent</p> <p>The government will openly engage with Australian experts to develop a framework for the safe and responsible use of AI.</p>	<p>A transparent and collaborative approach to regulating AI will ensure that developers and consumers are aware of their rights, the legal protections, and any liabilities that may apply. However, the engagement process will likely significantly slow down development of the Australian laws, potentially leaving the space underregulated for a longer time.</p>
<p>Principle 4: A Trusted International Partner</p> <p>Australia will be consistent with the Bletchley Declaration⁹ (to which Australia is a signatory), and utilise its domestic capabilities to support global action to address potential risks associated with AI technologies.</p>	<p>Given the widespread and global adoption of AI technologies in developed countries, engagement with international partners on the regulatory framework for AI in Australia will be beneficial, as it is more likely to result in addressing the same or similar risks and other considerations.</p> <p>Further, engagement with international partners will ideally ensure that there is a degree of comity between the regulatory frameworks pertaining to AI technologies across countries.</p>
<p>Principle 5: Community First</p> <p>Community interests will lie at the heart of the government's approach to implementing regulations.</p>	<p>Prioritisation of community interests in the development of a regulatory framework will ideally result in laws that allow AI technologies to promote the advancement of Australian society against the backdrop of the risks and disadvantages associated with it.</p>



⁹ The Bletchley Declaration, a non-binding statement of intention, is a commitment by signatories to the adoption and implementation of AI systems that are safe and responsible. It was signed and affirmed by Australia, the EU and 27 other countries at the UK-hosted AI Safety Summit in November 2023.

The Interim Response contemplates both short-term and long-term action that the government will take with respect to regulation of AI. These anticipated responses are summarised below:

Short-term

Creation of a voluntary AI safety standard for responsible adoption of AI in Australian businesses

Developing options for voluntary labelling and watermarking of AI-generated materials

Establishment of an expert advisory body to support the development of options for further AI guardrails

Long-term

Focusing on harm prevention through testing, transparency and accountability

The adoption of legislative vehicles to introduce mandatory safety guardrails for AI in high-risk settings

Establishing safety mechanisms and testing of such systems during the AI product life cycle

Reforms to privacy laws that focus on increasing transparency and integrity of automated decision-making that uses personal information

Registration under Australia's online safety laws of new mandatory industry codes requiring industry to provide safeguards to deal with illegal and harmful content generated and spread by AI

The shape and nature of the long-term actions will be informed by further community consultation and the effect of the short-term responses.

As evidenced in the short-term and long-term actions proposed in the Interim Response, prevention of harm from the adoption and use of AI technology is the government's main priority as it works toward finalising a regulatory regime for AI. This approach is consistent with the EU's proposed AI regulations and the EU's adoption of metrics to determine varying levels of "risk" in the development and deployment of AI systems.

As such, the implementation of a regulatory framework will likely be multifaceted and with a focus on risk minimisation, meaning businesses will be subject to layers of compliance dependent on the AI systems they may or may not deploy. If the laws developed in the Australian context emulate the EU's framework, businesses operating in Australia and abroad would benefit from a more universal application of regulations, where any checks and balances applicable to the development, deployment and use of AI is consistent on a global scale.

Moving Forward

As mentioned earlier, it is important to remember that the Interim Response is just that: interim. Businesses have the opportunity to have a say through the proposed consultations.

It remains to be seen exactly how the regulations governing AI technologies in Australia will be shaped. That said, the Interim Response suggests the government will roll out any regulatory regime in a way that includes, at a minimum, amendment of existing legislation. Given the lack of substantive detail in the Interim Response, this is likely to occur over an extended period of time. While we know this will draw on the guiding principles referred to above in addition to the short-term responses to be actioned, take into account further consultation, and be informed by the experience internationally as the laws in those jurisdictions are tested, it seems Australia still has a long journey ahead in formulating the details of its regulatory approach. With the pace of development of AI, if the approach is too consultation heavy, the review risks being outdated before it is even completed.

We continue to watch this space.

In the meantime, there are a number of steps businesses can take to remain agile pending further clarity and to also ideally position themselves to adapt and respond to increased future regulation. These include:

- Training employees on responsible use of AI and the risks associated with using such technologies.
- Establishing internal policies and protocols that addresses the risks of AI and provide strategies to mitigate harm to business. These include ensuring those policies and protocols consider whether disclosure regarding the use of AI should be given and when human oversight is required, and provide clear guidance on responsibility.
- Building robust cybersecurity infrastructure around the deployment of any AI technologies in the business cycle, including rigorous testing of systems before and after implementation.
- Undertaking audits.
- Considering adopting the government's voluntary AI safety standard, once released.
- Reviewing existing insurance policies and considering risks that may perpetuate as AI usage grows.
- Balancing the use of AI technologies with existing non-AI technologies and other manual processes.

Authors



Rebecca Heath

Partner

T + 61 9429 7476

E rebecca.heath@squirepb.com



Graeme Slattery

Partner

T + 61 2 8248 7876

E grame.slattery@squirepb.com



Jon Baker

Senior Associate

T + 61 8 9429 7618

E jon.baker@squirepb.com



Robert Abrahams

Associate

T + 61 8 9429 7623

E robert.abrahams@squirepb.com